



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEB 10 1995
JAN 10 1995

January 19, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1994-33

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for January 26, 1995.

Attachment

AGENDA ITEM
For Meeting of: 1-26-95

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2
3 ADVISORY OPINION 1994-33

4 Paul E. Sullivan
5 Attorney-at-Law
6 The Singletary Mansion
7 1565 The Alameda
8 San Jose, CA 95126

DRAFT

9 Dear Mr. Sullivan:

10 This responds to your five letters (dated September 2
11 and 28, November 2, and December 5, 1994, and January 5,
12 1995) on behalf of VITEL International Inc. ("VITEL"), which
13 request an advisory opinion concerning application of the
14 Federal Election Campaign Act of 1971, as amended ("the
15 Act"), to the sale and use of prepaid phone calling cards to
16 make contributions to political committees.

17 You state that VITEL is a domestic corporation
18 specializing in various aspects of the telecommunications
19 field including interactive voice response and operator
20 service, and long distance product development and marketing.
21 VITEL is an authorized distributor for AT&T, MCI, and other
22 long distance telephone carriers. It has additional
23 agreements with specialized interactive and operator service
24 providers. VITEL is exploring the use of a prepaid calling
25 card which can be used to make phone calls and is marketing
26 services related to the card to businesses and to non-profit
27 entities.

28 VITEL proposes to market such services to facilitate
29 fundraising by all types of political committees, including
30 separate segregated funds ("SSFs") of trade associations and
corporations, authorized committees, non-connected

3 committees, national party committees, and convention
4 committees and related host committees. In general, VITEL's
5 proposal will enable a client political committee or
6 connected organization to collect contributions from persons
7 holding a personalized phone card issued by the client.
8 Individual members of a connected organization's solicitable
9 class, or supporters of a political committee, would have the
10 incentive of obtaining the card to purchase discounted phone
11 time. When they purchase phone time, they can designate as a
12 contribution a portion of the dollar value purchased with
13 their personal credit card. A trade association or other
14 connected organization may offer the card to the persons in
15 its solicitable class through a mailing that complies with
16 the voluntariness requirements of 11 CFR 114.5(a), or a
17 political committee may advertise the card by direct mail and
18 include an 800 number for a person to call and order the
19 card. The card for the trade association would be unique to
20 that association, similar to an affinity credit card. The
21 name and logo of the association would appear on the card's
22 face, and dialing instructions and the caller-participant's
23 unique ID number would appear on the back. You anticipate
24 that the card for other committees may be similar (e.g., with
25 a picture of the candidate and committee name for an
26 authorized committee.)

27 To purchase time, an individual with a calling card
28 would call an 800 number which connects him or her to a live
29 operator. On the first use of a calling card, the operator
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3 is able to obtain the name, address, employer, credit card
4 number and the date on which the customer purchased time on
5 the card. An individual who wishes to purchase additional
6 time on the card provides the operator with a unique PIN
7 number and requests that the calling card be "refreshed" with
8 a certain dollar value. During the initial call, or when the
9 caller chooses to refresh the card, the operator will ask if
10 the caller wishes to contribute to the particular political
11 committee.

12 If the caller decides to make a contribution, he or she
13 would be able to designate a percentage of the newly
14 purchased dollar amount to be treated as a voluntary
15 contribution to the political committee. For example, the
16 caller/phonecard holder could ask that \$100 be charged to his
17 credit card to purchase, at a rate of 50 cents per minute,
18 200 minutes of phone time. He directs that ten percent of
19 the \$100 be designated as a contribution. Then \$10 would be
20 designated as a contribution from the cardholder to the
21 committee and the cardholder's card is credited with \$90
22 worth of phone time or 180 minutes. The purchased amount of
23 phone time and the contribution are immediately debited
24 against the individual's credit card in separate
25 transactions. VITEL uses a merchant bank to provide the
26 credit card debit services. VITEL, therefore, does not
27 control, nor will it be in possession of, the funds debited
28 against the individual's credit card for the political
29 contribution.
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3 The caller may also be offered other phone options if
4 VITEL's client has purchased access to them. For example,
5 after dialing in the PIN number, the caller could dial "2"
6 and hear a weekly message promoting a candidate or an issue
7 (in the case of a trade association), or a message from the
8 candidate (in the case of an authorized committee), or "3" to
9 leave a message for the trade association or candidate.

10 The caller may make a contribution only to the political
11 committee designated for that calling card, i.e., a card
12 issued pursuant to a particular contract between an entity
13 and VITEL. For example, the phone card issued by a trade
14 association to the individual in that association's
15 solicitable class may be used to authorize political
16 contributions only to the trade association's SSF, and the
17 operator is authorized to accept only those contributions.
18 It is not anticipated that earmarked contributions to
19 candidates through the SSF will be part of the menu of
20 services.

21 The costs and charges for this proposal are as follows.
22 VITEL is able to purchase long distance telephone time at a
23 volume discount. Through use of the calling card, the
24 individuals associated with the client corporation or trade
25 association or contributors to the client committees may make
26 calls at "a below market commercial rate." VITEL and the
27 client arrive at a contract price, which is a negotiated per
28 minute rate. The contract rate will provide VITEL with the
29 revenue necessary to cover the program's administration and
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3 overhead expenses, e.g., operators, interactive voice
4 response menu platforms, on-line card validations, services
5 of the merchant bank, and still maintain a profit for VITEL.
6 The client organization or committee will be responsible for
7 any upfront expenses, e.g., for art work on the phone card or
8 phone card production. This may be paid by a retainer up
9 front or billed on a regular thirty day basis.

10 Within a certain limit, the contributor has discretion
11 over the amount of the contribution. There would be a
12 maximum amount eligible to be designated by the contributor
13 to the Federal committee, since VITEL must ensure that
14 administrative expenses and operational costs are covered and
15 a profit margin is maintained. You state that, under no
16 situation, however, will the amount contributed represent any
17 fees or profits which otherwise represent VITEL's interest or
18 that of the carrier. VITEL will maintain transaction records
19 for all purchases of air time and provide quarterly reports
20 to the client. These reports will also reflect the
21 contributions and are adaptable for the committee's reporting
22 requirements.

23 Legal Analysis

24 VITEL's proposed arrangements with connected
25 organizations and political committees raise a number of
26 issues for analysis. These are: (1) whether the in-kind
27 services provided by VITEL will result in the making of
28 corporate contributions; (2) the use of credit cards for
29 contributions by the callers; (3) the payment of expenses by
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3 connected organizations rather than committees; (4) the
4 obtaining of contributor information and providing it to the
5 committee; and (5) requirements with respect to particular
6 types of committees.

7 The primary concern in addressing the permissibility of
8 the described arrangements is whether prohibited in-kind
9 corporate contributions or expenditures will result under 2
10 U.S.C. §441b(a) and 11 CFR 114.2(b). The term "contribution
11 or expenditure" is defined to include "any direct or indirect
12 payment, distribution, loan, advance, deposit, or gift of
13 money, or any services, or anything of value ... to any
14 candidate, campaign committee, or political party or
15 organization in connection with any [Federal] election." 2
16 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1). See 2 U.S.C.
17 §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and
18 100.8(a)(1). "Anything of value" includes the provision of
19 services at less than the usual and normal charge, i.e., less
20 than a commercially reasonable hourly or piecework charge for
21 the services prevailing at the time the services were
22 rendered. 11 CFR 100.7(a)(1)(iii)(B).

23 The Commission has considered a number of business
24 arrangements between political committees and companies to
25 assist the committees in raising funds. See Advisory Opinions
26 1992-24, 1991-26, 1991-20, and 1991-18. The Commission has
27 stated that, if the vendor does not receive the usual and
28 normal charge for its services, it will have made an in-kind
29 corporate contribution. In discussing the proper charge, the
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3 Commission has focused with particularity on the need for an
4 adequate profit and on the advance of services or
5 contribution proceeds without assurance of adequate
6 compensation to the vendor. Advisory Opinions 1991-20,
7 1991-18 and 1990-19. Here, however, the vendor would receive
8 payment of an agreed upon contract rate that would cover all
9 of VITEL's expenses, plus a reasonable profit. Assuming that
10 the contract rate (along with payments for up-front expenses)
11 guarantees a profit to VITEL regardless of the success or
12 failure of the transaction with a particular committee, your
13 proposal would satisfy the concerns as to profit and
14 advances. The Commission also assumes that the profit for
15 these transactions comports with those for transactions with
16 non-political customers. Advisory Opinion 1992-24.

17 The use of credit cards raises the question of the use
18 of VITEL funds or other corporate funds to process the credit
19 card transactions. In the past, the Commission has permitted
20 the use of credit cards in a variety of circumstances. See
21 Advisory Opinions 1990-4, 1984-45, and 1978-68. The
22 Commission has approved plans by authorized committees and
23 separate segregated funds whereby contributors would charge
24 contributions to their individual credit cards. In the case
25 of contributions to the authorized committee, the amount
26 actually remitted to the committee would be reduced by
27 charges deducted by the card issuer (although this would not
28 reduce the amount of the reportable contribution). The
29 set-offs or service charges would be expenditures by the
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3 committee. In the case of contributions to separate
4 segregated funds, the connected organizations could pay
5 charges by the credit card company; such payment would be
6 exempt administrative or solicitation costs under 2 U.S.C.
7 §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 102.6(c)(2). As
8 you describe it, VITEL is utilizing its own fulfillment and
9 merchant bank services. The cost for these services is
10 included in the contract rate and is paid for by the
11 committee or connected organization. Thus, no corporate
12 contribution results. This bears similarity to the
13 arrangement in Advisory Opinion 1989-26 whereby an authorized
14 committee's bank would debit the checking accounts of
15 contributors on a prearranged regular basis. The authorized
16 committee paid its depository a set-up fee, monthly handling
17 fees, and a per entry fee.

18 Contributions by VITEL are also avoided by the immediate
19 debiting of the caller's credit card for the making of the
20 contribution. This eliminates the concern that VITEL or a
21 subcontractor company is financing the political
22 contributions made by the cardholders during a certain period
23 and, thereby, making advances of corporate funds. Compare
24 with the concerns expressed as to 900 lines in Advisory
25 Opinions 1991-20 and 1990-14.

26 In the case where the connected organization, and not a
27 political committee, is the contracting entity, the
28 Commission notes that VITEL will attempt to take precautions
29 to ensure that the corporate entity does not make a corporate
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3 contribution or expenditure in its solicitation of
4 contributions, or in the optional election advocacy messages
5 it may make available to callers. As stated above, costs
6 incurred by a connected organization in administering its SSF
7 and soliciting contributions to it are exempt from the
8 definition of contribution. 2 U.S.C. §441b(b)(2)(C). To
9 stay within this exemption, the connected organization may
10 only solicit contributions from a restricted class to its own
11 SSF, or one affiliated with it, and may communicate election
12 advocacy only to that class. 2 U.S.C. §441b(b)(2)(A) and
13 (4)(A); 11 CFR 114.1(a)(2)(i) and (c), 114.5(g)(1), and
14 114.3(a). By permitting operators to accept use of the card
15 issued by a client connected organization for contributions
16 to that organization's SSF only, connected organizations
17 would avoid paying for solicitation services in support of a
18 political committee that is not its SSF or affiliated with
19 its SSF. The proposed use of the unique PIN number (referred
20 to above) as a prerequisite for accessing an election
21 advocacy message would avoid unlawful distribution of those
22 communications.

23 The example of connected organization you specifically
24 pose, i.e., the trade association, creates difficulties for
25 your proposal. The restricted class for receiving trade
26 association solicitations for SSF contributions includes the
27 executive and administrative personnel of the trade
28 association, persons holding trade association membership as
29 individuals, and the families of those persons. In addition,
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3 the restricted class for contribution solicitations is
4 composed of the stockholders and executive and administrative
5 personnel of the trade association's member corporations, and
6 the families of such stockholders and personnel, if the
7 member corporation has separately and specifically approved
8 the solicitations and the member corporation has not approved
9 a solicitation by any other trade association for the
10 calendar year. 2 U.S.C. §441b(b)(4)(D); 11 CFR 114.8(c),
11 (d), and (i)(2). A communication with election advocacy
12 regarding a candidate, which is not a contribution
13 solicitation for the SSF, may be made to a different class
14 that only partially overlaps with the solicitable class,
15 i.e., representatives of a member corporation (regardless of
16 solicitation approval by the member corporation) with whom
17 the trade association normally conducts association
18 activities, as well as the executive and administrative
19 personnel and individual members of the trade association and
20 their families. 11 CFR 114.8(h) and (i)(1); 114.3(a)(2). In
21 view of the principal goal of soliciting contributions for
22 the SSF and the intention to distribute cards only to
23 eligible solicitees, the trade association may wish to
24 eliminate election advocacy communications from its caller
25 choices, rather than delivering them to a narrower class of
26 persons who may be both solicited for SSF contributions and
27 eligible to receive election advocacy communications.

28 Your proposal also appears to avoid impermissible
29 contributions by solicitees and to facilitate recordkeeping
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3 and reporting as required by the Act and Commission
4 regulations. Through use of a live operator, information for
5 itemization purposes will be obtained. 2 U.S.C.
6 §434(b)(3)(A); 11 CFR 104.8(a) and (b). The Commission notes
7 that you will have to provide reports to your client more
8 frequently than on a quarterly basis to ensure their
9 compliance with some of the reporting deadlines, e.g., as to
10 pre-election and post-election reports and as to monthly
11 filers. In addition, VITEL will be able to verify that the
12 credit card being used is that of an individual rather than a
13 corporation. Further screening of impermissible
14 contributions may be performed by the committee, e.g., for
15 contributions by Federal contractors or foreign nationals. 2
16 U.S.C. §§441c and 441e. In order to help avoid prohibited
17 contributions and contributions in the name of another, VITEL
18 should suggest to the client committee or corporation that
19 its solicitations include cautions as to the types of
20 impermissible contributions, including a prohibition against
21 the cardholder receiving reimbursement for the debit to his
22 or her card. See 2 U.S.C. §441f.^{1/}

23 The types of committees that present a unique situation
24 as to contributors are the national political party
25 convention committees and convention city host committees.
26 Party convention committees that are publicly funded in full
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28 ^{1/} VITEL should also suggest to its clients that are
29 connected organizations that solicitations should be in
30 compliance with the voluntariness requirements of 11 CFR
114.5(a).

3 may not accept private contributions. If, however, a major
4 or minor party convention committee elects to receive part of
5 its entitlement in public funds or if there is a deficiency
6 in the Presidential Election Campaign Fund, the committee may
7 receive private contributions that are subject to the limits
8 and prohibitions of Title 2. 11 CFR 9008.6(a)(2) and (3).

9 Any agreement between VITEL and the party convention
10 committee should take into account the limits on the amounts
11 that may be raised. Host committees may receive donations
12 from individuals, but they must be from local persons, e.g.,
13 within the Metropolitan Area of the convention city. 11 CFR
14 9008.52(c)(1)(and (2)). An arrangement by VITEL with a host
15 committee should ensure screening by the operator as to the
16 address of the donor.

17 The Commission notes that different fundraising methods
18 may have different requirements applied to them in other
19 advisory opinions, e.g., 900 lines and other telephone
20 fundraising. See Advisory Opinions 1991-26, 1991-20, and
21 1991-18. Those requirements were applied to comport with
22 unique needs raised by the different methods, and nothing in
23 this opinion should be construed as modifying those
24 requirements.^{2/}

25
26 2/ The Commission notes your footnoted statement that VITEL
27 anticipates offering its services to corporations, trade
28 associations, and national and state political parties as a
29 means of raising treasury funds or "soft dollar"
30 contributions at the national and state levels. You state
that, "[s]ince these types of transactions are not
specifically within the jurisdiction of the Commission, VITEL
will not present a detailed discussion of those components in

3 This response constitutes an advisory opinion concerning
4 application of the Act, or regulations prescribed by the
5 Commission, to the specific transaction or activity set forth
6 in your request. See 2 U.S.C. §437f.

7 Sincerely,

8
9 Danny L. McDonald
10 Chairman

11 Enclosures (AOs 1992-33, 1992-24, 1992-20, 1991-26, 1991-20,
12 1991-18, 1990-19, 1989-26, 1984-45, and
13 1978-68)

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27 (Footnote 2 continued from previous page)
28 its proposal." The Commission cautions against the
29 assumption made with respect to its jurisdiction. See Common
30 Cause v. Federal Election Commission, 692 F.Supp. 1391
(D.D.C. 1987); 11 CFR 106.5 and 106.6; Advisory Opinions
1992-33 and 1992-20. Without further information as to the
proposed methods of raising treasury funds or soft dollars,
the Commission does not comment on such activity.